procedural setting, where the "qualified immunity complications" to which petitioner himself alludes (Pet. 27) would not be present.

II. The Alleged Conflict Presented in Petitioner's First Question Is Neither Clear Nor Significant.

Petitioner's supposed direct and far-reaching conflict in any event does not really exist.[4] As even petitioner acknowledges, the federal decisions are uniform at the circuit level in either supporting the result reached by the Eighth Circuit below, or in not contradicting it. *See United States v. Musa*, 401 F.3d 1208, 1214-15 (10th Cir. 2005) (holding that there is no constitutional requirement to seek a "no-knock" warrant when police reasonably believe a "no-knock" search is necessary), *cert. denied*, 74 U.S.L.W. 3210 (U.S. Oct. 3, 2005); *United States v. Shipley*, 45 Fed. Appx. 706, 708 (9th Cir. 2002) (same); *see also Dalia v. United States*, 441 U.S. 238, 257 (1979) (stating that "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant – subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures' ").[5]

---

[4] Nor would the new constitutional rule petitioner seeks have nationwide applicability. As petitioner effectively acknowledges, Pet. 8-9, only in 34 of the 50 states, where petitioner argues "no-knock" search warrants are now "allowed," could there possibly be some requirement under petitioner's proposed rule for law enforcement officers to seek threshold court approval for "no-knock" searches.

[5] The evenly split en banc decision in *United States v. Brown*, 276 F.3d 14 (1st Cir. 2002) (en banc) is not contrary to the decision below – in fact, its effect was to vacate an earlier panel decision that had supported petitioner's position.

Petitioner's alleged conflict is thus based on a handful of supposedly contrary state court decisions. But these cases all involved, at least in part, state courts' interpretations of their own statutes or decisional law.[6] As the Eighth Circuit noted below in effectively distinguishing the state law decisions on which petitioner now relies (and thus avoiding any direct conflict with them) (Pet. 10a):

> Of course, state law may require, by statute or judicial decision, that law enforcement officers who have reason to believe that exigent circumstances justify a no-knock entry include a request for that authority in the warrant application. *See Davis v. State*, 859 A.2d 1112, 1124-26 (Md. 2004) (collecting conflicting authorities from various States). But for Fourth Amendment purposes, the relevant question is whether the police have reasonable suspicion of exigent circumstances at the time they execute the warrant.

These same state cases in any event do not directly stand for the broad constitutional principle that petitioner advances. In *Garza v. State*, 632 N.W.2d 633 (Minn. 2001), for example, the decision was not based on a failure to obtain a "no-knock" warrant – the police in *Garza* actually had such a warrant, and the court simply suppressed evidence because it held that the *magistrate's* decision to add a "no-knock" provision was insufficiently supported. 632 N.W.2d at 638-39. In *Commonwealth v. Jimenez*, 780 N.E.2d 2 (Mass. 2002), the police also had obtained a

---

[6] Every "conflicting" state court decision cited by petitioner concerned motions to suppress evidence in state court criminal proceedings – none sought to subject individual officers to personal liability based on some "clearly established" constitutional requirement to seek prior judicial approval of an unannounced entry.

"no-knock" warrant, which the court found had been improvidently executed because of changed, fact-specific circumstances, thus requiring evidence to be suppressed. *Id.* at 9-10. Even petitioner's principal case, the Montana decision in *State v. Anyan*, 104 P.3d 511 (Mont. 2004), *cert. denied*, 125 S.Ct. 2544 (2005), suggests only that in Montana, police "ordinarily" should seek prior judicial approval for "no-knock" searches. 104 P.2d at 525. In reaching this conclusion, moreover, *Anyan* relied in part on the Montana Constitution, which it held provided broader protection than the Fourth Amendment. *See* 104 P.3d at 524-25 (stating that "Article II, Sections 10 and 11 of the Montana Constitution provide greater protections against unreasonable searches and seizures and government infringement of individual privacy than does the federal constitution") (citations omitted).

None of petitioner's "conflicting" cases were actions for damages under 42 U.S.C. § 1983. None purported to adopt, as a matter of federal constitutional law, the bright-line constitutional rule petitioner now seeks from the Court. The alleged conflict, to the extent it is a conflict at all, is certainly neither severe nor "pressing." Pet. 15. At most, it represents a preference on the part of a few states for prior judicial approval for unannounced searches in appropriate circumstances. This is not a "conflict" that warrants the Court's intervention.

III. The Eighth Circuit's Resolution of Petitioner's First Question Was in Any Event Correct, and Petitioner's Proposed Bright-Line Rule Would Be Bad Public Policy.

The Eighth Circuit's decision was in any event manifestly correct as a matter of both constitutional law and

public policy. Exigent circumstances supporting a "no-knock" search should always be available to consider a search's reasonableness for purposes of 42 U.S.C. § 1983, regardless of whether these circumstances were first presented to a judicial officer. *See, e.g., Dalia*, 441 U.S. at 258-59; *Musa*, 401 F.3d at 1214-15. As the en banc court noted below:

> To be sure, many exigent circumstances cases have turned on facts that unfolded as the police approached the house to be searched, or after they initially knocked. *See, e.g., Richards*, 520 U.S. at 388-89. But the Fourth Amendment analysis turns on the totality of the circumstances, including facts gathered by the police before they applied for the warrant. *See United States v. Scroggins*, 361 F.3d 1075, 1081-82 (8th Cir. 2004). The district court's approach would *require* that the police request no-knock authority whenever the basis for a warrant application might justify a no-knock entry. Such a rule might encourage excessive use of the no-knock tactic and would be contrary to Supreme Court decisions applying the Fourth Amendment's reasonableness standard. Therefore, if the facts known prior to obtaining the warrant justify a no-knock entry, and if no contrary facts are discernable to the officers who execute the warrant, the no-knock entry is constitutionally reasonable.

Pet. 11a (emphasis original).

Contrary to petitioner's claim, nothing about the decision below "contravenes fundamental Fourth Amendment principles." Pet. 10. The Court has repeatedly recognized that safety concerns can justify executing search warrants without knocking and announcing. *See*

Richards v. Wisconsin, 520 U.S. 385, 394 (1997) (recognizing that officers may conduct "no-knock" entry when they have a "reasonable suspicion" that announcing their presence would create an undue safety risk); *Wilson v. Arkansas*, 514 U.S. 927, 937 (1995) (stating that countervailing law enforcement interests, including a reasonable belief that knocking and announcing "would have placed [the police] in peril," could "provide the necessary justification for an unannounced entry"); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) (recognizing as "clearly reasonable" an unannounced search at a residence, when police had information from a confidential source that an individual "with a violent past who reportedly had access to a large supply of weapons" might be inside). None of these cases required police to specifically obtain "no-knock" warrants. They instead allowed the searches to be conducted based on the totality of the circumstances known to the officers at the time of the search. In fact, in *Richards*, the Court approved a "no-knock" search even though a magistrate had expressly refused to issue such a warrant. *Richards*, 520 U.S. at 395; *see also Dalia*, 441 U.S. at 258-59 (noting that particular method of executing warrants left to law enforcement, subject to Fourth Amendment reasonableness inquiry).

Current law provides powerful curbs to law enforcement excesses, including suppression of evidence and the threat of personal liability under 42 U.S.C. § 1983 for constitutional violations. There is already an incentive to seek prior judicial approval where appropriate because such prior approval would effectively immunize individual officers from personal § 1983 liability. But to make this a *requirement*, at the expense of the personal safety of law enforcement officers facing imminent danger, cannot be a

wise policy. To the contrary, as the Eighth Circuit correctly noted below, it will merely invite police to justify and obtain "no-knock" warrants in advance as a matter of routine. Pet. 11a. It seems particularly unwise to subject officers to personal liability, even where at the time of entry the circumstances suggest imminent danger, simply because no application for a "no-knock" warrant was ever made. The Court's precedent now prudently authorizes a flexible standard of viewing the totality of the circumstances from the point of view of the executing officers at the time of the search. Here the Eighth Circuit properly followed this precedent, as did the police, and petitioner offers no convincing argument for now overruling it.

IV. Petitioner's Second Question Presents No Issue of Substance.

Petitioner's second question presents exactly the sort of fact-bound determination the Court should avoid, especially since nothing about this case would add meaningfully to the Court's existing decisions addressing the scope of permissible "no-knock" searches. Even if petitioner's second issue could impact the present parties – which it cannot, for the same qualified immunity considerations already discussed – whether the particular facts reasonably known to the officers here were sufficient to justify an unannounced search is not subject to serious debate. These facts certainly do not place this case in some grey area, or anywhere near the "fulcrum" (Pet. 22) of existing case law.

In arguing that circumstances like those here have "divided" courts (Pet. 19 *et seq.*), petitioner glosses over two key facts that readily supported the search under

existing precedent. Although petitioner correctly suggests (Pet. 18 *et seq.*) that the suspected presence of firearms cannot, standing alone, justify an unannounced search, the police officers here were not simply relying on a report that there were numerous weapons scattered throughout petitioner's home. Nor were they simply relying on some suspicion of unspecified "drug activity." Pet. 21. They instead had a report of a *clandestine methamphetamine lab*, and a separate report suggesting that a person "involved" in that operation (Pet. 67a-68a), and thus a potential occupant of the home (petitioner's son), had recently been arrested for possessing a sawed-off shotgun.[7] Both of these facts gave particularized support for a "no-knock" search.

Operating methamphetamine laboratories present unique, inherently dangerous risks. As the United States Department of Justice has noted in its publication *Methamphetamine Situation in the United States*: "[T]he clandestine nature of the [methamphetamine] manufacturing process and the presence of ignitable, corrosive, reactive, and toxic chemicals at the sites, have resulted in explosions, fires, toxic fumes, and irreparable damage to

[7] The fact that some of this information subsequently turned out to have been incorrect does not change the fact that it was reasonable for the individual officers here to have relied on it. *See, e.g., Baker v. McCollan*, 443 U.S. 137, 145-46 (1979) (allowing police officer to rely on investigative work of others, and refusing to require him to independently investigate information given him by other law enforcement personnel). Indeed, petitioner does not argue to the contrary, but assumes the information available to the entry team was correct even as he asks the Court to hold it did not justify the entry into petitioner's home.

human health and to the environment."[6] And it is not just the chemicals used in manufacturing methamphetamine that are hazardous – the same DEA report suggests that individuals operating such illicit labs tend themselves to be inherently violent and dangerous:

> Methamphetamine laboratory operators often are well-armed, and their laboratories occasionally are booby-trapped and equipped with scanning devices employed as security precautions. Weaponry, ranging from single firearms to arsenals of high-powered weapons and explosives, are commonly found at laboratory sites. Laboratory operators, or "cooks," frequently display little concern for public safety or the environment.

Id. The special search team was acutely aware of these inherent risks when it executed the search warrant. *See* App. at 13a-14a (recounting Sergeant Greenwell's testimony about the inherent safety risks of clandestine methamphetamine labs).

The report about the sawed-off shotgun raised further specific concerns. Simply possessing such a weapon is prima facie evidence of a tendency toward violent conduct. *See, e.g., United States v. Johnson*, 246 F.3d 330, 334-35 (4th Cir. 2001) (agreeing with three other circuits that, "unlike the possession of a handgun or shotgun, the possession of a sawed-off shotgun always presents a serious potential risk of physical injury to another") (citing *United States v. Brazeau*, 237 F.3d 842, 845 (7th Cir.

---

[6] United States Department of Justice, Drug Enforcement Administration, *Methamphetamine Situation in the United States, March 1996* (visited October 12, 2005) http://www.fas.org/irp/agency/doj/dea/product/meth/threat.htm#hazmat.

2001); *United States v. Allegree*, 175 F.3d 648, 651 (8th Cir.), *cert. denied*, 528 U.S. 958 (1999); and *United States v. Hayes*, 7 F.3d 144, 145 (9th Cir. 1993)); *see also United States v. Fortes*, 141 F.3d 1, 6-8 (1st Cir. 1998) (concluding that mere possession of a sawed-off shotgun is a "violent felony" within the meaning of 8 U.S.C. § 924(e)).

The Court's existing decisions adequately address this very situation, and signal clearly that law enforcement safety concerns can excuse a duty to knock and announce in appropriate cases. Here the officers on the scene reasonably expected (1) an operating methamphetamine lab, with all its inherent risks; (2) weapons throughout the house; (3) drug sales being conducted from the house in small, easily disposable packages; *and*, critically, (4) the presence of dangerous individuals, not just because of the suspected methamphetamine laboratory, but also because of the specific information that one of the assumed occupants had recently been arrested for possessing a sawed-off shotgun, a weapon that has no purpose other than to inflict violent injury or death.

Far from resting at or near the "fulcrum" (Pet. 22), this case easily falls within the recognized ambit of exigent circumstances justifying a "no-knock" search under the Court's established precedent. None of the supposedly "conflicting" cases cited by petitioner presented this level of risk. There was no confusion in this case, and there is insufficient confusion generally in the lower courts, to justify the Court's revisiting this well-defined area, even if the facts here were not so clearly covered by existing precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LISA S. MORRIS
General Counsel
KANSAS CITY, MISSOURI
POLICE DEPARTMENT
Police Headquarters
1125 Locust
Kansas City, Missouri 64106
(816) 234-5057

WILLIAM E. QUIRK
Counsel of Record
RUSSELL S. JONES, JR.
SHUGHART, THOMSON &
KILROY, P.C.
120 West 12th Street,
Suite 1800
Kansas City, Missouri 64105
(816) 421-3355
Fax (816) 374-0509

Attorneys for Respondents

APPENDIX A

INSTRUCTION NO. 25

If you find in favor of plaintiff on his claim against Defendant Grant as submitted in Instruction Number 19, then you must consider plaintiff's failure to train claim against Defendants Dennis C. Eckold, Dr. Stacey Daniels-Young, Karl Zobrist, Juavier M. Perez, Jr. and Mayor Kay Barnes, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri.

Your verdict must be for plaintiff on this claim if all of the following elements have been proved by the greater weight of the evidence:

First, that the training program of the Kansas City, Missouri Police Department was inadequate to train its officers when to knock, or when to wait a reasonable period of time after making an announcement, before forcibly entering a residence; and

Second, the need for more training or different training was so obvious that the Board can reasonably be said to have been deliberately indifferent to the need for such training; and

Third, as a direct result, plaintiff was damaged.

Mere negligence or inadvertence does not constitute deliberate indifference.

INSTRUCTION NO. 28

If you find in favor of plaintiff on his claim against Defendant Grant as submitted in Instruction Number 19, then you must consider plaintiff's custom and practice

claim against Defendants Dennis C. Eckold, Dr. Stacey Daniels-Young, Karl Zobrist, Juavier M. Perez, Jr. and Mayor Kay Barnes, in their official capacities as members of the Board of Police Commissioners of Kansas City, Missouri.

Your verdict must be for plaintiff on this claim if all of the following elements have been proved by the greater weight of the evidence:

First, the Kansas City, Missouri Police department had a custom and practice that either did not require a knock before announcement, or did not require waiting for a reasonable period of time after making an announcement, before forcibly entering a residence; and

Second, such custom and practice was so obvious that the Board can reasonably be said to have been deliberately indifferent to the existence of the custom and practice; and

Third, as a direct result, plaintiff was damaged.

Mere negligence or inadvertence does not constitute deliberate indifference.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DAVID DORAN,	)	
Plaintiff,	)	
v.	)	**Case No. 01-0824-CV-W-5**
DENNIS C. ECKOLD, et al.,	)	
Defendants.	)	

SEPARATE MOTION FOR SUMMARY JUDGMENT OF DEFENDANT GRANT

COMES NOW Defendant, Sergeant Ty Grant (Grant), by and through his undersigned counsel, and pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure, moves and prays the Court to enter its Order granting summary judgment in favor of Grant and against Plaintiff David Doran (Doran) for the following reasons:

1. Doran's Complaint fails to establish any genuine issue of material fact and Grant is entitled to judgment as a matter of law.

2. As to Count III of Doran's Complaint, there is no evidence nor will there be any evidence that Grant used excessive force when removing Doran from the residence at 612 West 101st Street, Kansas City, Missouri on August 11, 1998 or that Grant failed to seek medical treatment for Doran and as a result, Grant is entitled to judgment as a matter of law.

3. As to Count III of Doran's Complaint, Grant is entitled to qualified immunity. 4. As to Count IV of Doran's Complaint, there is no evidence nor will there be any evidence that Grant used excessive force on Doran as suggested above or that he committed an assault and/or battery on Doran and as a result, Grant is entitled to judgment as a matter of law.

5. As to Count IV of Doran's Complaint, Grant is entitled to official immunity.

6. As to Count VI of Doran's Complaint, there is no evidence nor will there be any evidence that Grant conducted an illegal search of Doran's residence or that Grant caused excessive damage to Doran's property and as a result, Grant is entitled to judgment as a matter of law.

7. As to count VI of Doran's Complaint, Grant is entitled to qualified immunity.

In support of this motion, Grant files herewith his Suggestions.

Respectfully submitted,

/s/Dale H. Close
DALE H. CLOSE (19336)
Legal Advisor's Office
Kansas City Police Department
1125 Locust Street
Kansas City, Missouri 64106
(816) 234-5056
FAX (816) 234-5333
ATTORNEY FOR
DEFENDANT GRANT

Supreme Court, U.S.
FILED
NOV - 7 2005
OFFICE OF THE CLERK

No. 05-316

IN THE
Supreme Court of the United States

DAVID DORAN,
Petitioner,

v.

DENNIS ECKOLD, in his official capacity as President of the Board of Police Commissioners of Kansas City, Missouri, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

WALTER R. SIMPSON
SANDERS, SIMPSON & FLETCHER
1125 Grand Boulevard
Suite 1400
Kansas City, MO 64106
(816) 471-6444

JEFFREY L. FISHER
Counsel of Record
DAVIS WRIGHT TREMAINE LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

DAVID R. SMITH
DAVID R. SMITH, P.C.
901 West 43rd Street
Kansas City, MO 64111
(816) 753-1800

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The Qualified Immunity Doctrine Is Irrelevant Here. 1

II. This Court Should Resolve Whether Officers' Failures To Seek No-Knock Warrants When All Relevant Facts Are Foreknown Precludes, Or At Least Casts Doubt On, The Constitutional Reasonableness Of No-Knock Entries. 4

A. The Conflict On This Issue Is Real 5

B. The Eighth Circuit's Holding Is Incorrect. 7

III. This Court Should Resolve Whether Suspicions, Such As Those Here, Concerning Drug Activity And Weapons Create Exigent Circumstances Permitting Officers To Conduct No-Knock Entries. 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Blakely v. Washington, 124 S. Ct. 2531 (2004) 6

Commonwealth v. Jimenez, 780 N.E.2d 2 (Mass. 2002) 5

Crawford v. Washington, 541 U.S. 36 (2004) 6

Garza v. State, 632 N.W.2d 633 (Minn. 2001) 5

Hudson v. Michigan, No. 04-1360 1

Jones v. Wilhelm, 425 F.3d 455 (7th Cir. 2005) 8

Monell v. New York City Department of Social Servs., 436 U.S. 658 (1978) 3

Owen v. City of Independence, 445 U.S. 622 (1980) 3

People v. Lujan, 484 P.3d 1238 (Colo. 1971) 5

Richards v. Wisconsin, 520 U.S. 385 (1997) 5, 9

Smith v. Massachusetts, 125 S. Ct. 1129 (2005) 6

State v. Anyan, 104 P.3d 511 (Mont. 2004), *cert. denied*, 125 S. Ct. 2544 (2005) 5, 8

State v. Wright, 697 N.E.2d 693 (Ill. 1998) 9

United States v. Smith, 386 F.3d 753 (6th Cir. 2004) 9

Wilson v. Arkansas, 514 U.S. 927 (1995) 5

Other authority:

Amar, Akhil Reed, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994) 1, 3

Stuntz, William J., *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393 (1995) 1

REPLY BRIEF FOR PETITIONER

Respondents' overarching contention is that this civil lawsuit is the wrong kind of setting to resolve the uncertainties concerning the Fourth Amendment's knock-and-announce doctrine. Better, they say, to wait for suppression dispute in a criminal case. But Respondents have it exactly backwards. The Framers envisioned lawsuits just like this – quasi-tort suits where damages would be paid by local government entities – as the principal means of developing and enforcing the prohibition against unreasonable searches or seizures. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 Yale L.J. 393, 410 (1995) ("In the eighteenth century limits on search and seizure were enforced, if at all, in trespass actions" tried to juries.); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 785-86, 812 (1994) ("Tort law remedies [paid by governmental entities] were thus clearly the ones presupposed by the Framers of the Fourth Amendment and counterpart state constitutional provisions."). The exclusionary rule has no comparable pedigree, and depending on this Court's upcoming ruling in *Hudson v. Michigan*, No. 04-1360, may be completely inapplicable in this context.

This case, in short, is a perfect vehicle to bring order to substantive knock-and-announce law. The jury's verdict rests on a departmental custom and practice, so qualified immunity is irrelevant to the outcome. The issues over which the Eighth Circuit's en banc court divided have divided other courts as well. And the Eighth Circuit majority's resolution of these issues contravenes this Court's precedent.

I. The Qualified Immunity Doctrine Is Irrelevant Here.

Not once in Respondents' 103 pages of briefing in their motion for new trial, their merits briefs to Eighth Circuit, their en banc petition, or their supplemental merits brief to en banc court did Respondents argue that the qualified immunity

doctrine shielded any of them from liability. The Eighth Circuit's opinion is entirely silent on the subject. Nevertheless, Respondents' principal argument in opposition to certiorari is that reversing the Eighth Circuit with respect to either question presented "cannot affect the existing dispute between the parties" because the individual officers are entitled to qualified immunity, which, in turn, insulates the Board of Police Commissioners from municipal liability. Br. in Opp. at 4-8.

Respondents' new post-verdict argument misapprehends how basic § 1983 law applies to the undisputed contours of the district court's judgment. The jury found that individual officers' failures to knock and announce violated the Fourth Amendment and that the officers committed those violations pursuant to the Board's custom and practice never to knock and announce – regardless of the type of warrant obtained – before executing warrants on suspected "drug houses." *See* Pet. for Cert. at 4-5.[1] Once the jury entered this verdict against the Board, any qualified immunity defense the individual officers might have raised before trial became irrelevant to the amount of money that Petitioner may recover. Respondents are jointly and severally liable for the injuries they jointly caused, so the verdict against the Board is sufficient, in and of itself, to sustain the full monetary judgment in favor of Petitioner. No individual officer will have to pay a dime. *See* App. 59a-61a.

Lest there be any confusion, the verdict against the Board does not depend in any way on whether any individual officers violated Petitioner's "clearly established" rights. The Board is a municipal entity, and it long has been settled that municipal entities do not enjoy any kind of qualified, or "good faith," immunity under § 1983 for unconstitutional customs, practices, or policies – *even when those entities' individual officers*

---

[1] Although Respondents state at one point that the jury held the Board members "personally liable," Br. in Opp. at 5, the record is clear that Board members were sued only in their official capacities, as stand-ins for the Board (i.e, the municipal entity) itself. *See* Pet. App. 60a, 31a, 35a.

themselves act in good faith and thus are entitled to qualified immunity in the same lawsuit. Owen v. City of Independence, 445 U.S. 622, 650-57 (1980); *see also Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 691 (1978). While Respondents may believe that municipal entities should not be held liable unless their policies violate "clearly established" rights (Br. in Opp. at 5-7), this Court expressly held in *Owen* – consistent with the Fourth Amendment's history – that "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 655. The tragic facts of this case underscore the wisdom and good sense of that holding.[2]

That the jury instructions here required the jury to find that Officer Grant violated Doran's Fourth Amendment rights in order to impose liability against the Board (*see* Br. in Opp. at 7 n.3 & App. A) does not change the calculus. Consistent with the district court's pretrial ruling rejecting Officer Grant's assertion of qualified immunity (*see* Br. in Opp. at 3), the jury instructions respecting Officer Grant's liability required the jury to find only that he violated the Fourth Amendment; they contained no reference, in name or substance, to the qualified

---

[2] Indeed, under the original understanding of the Fourth Amendment, it would be proper, under these circumstances, to impose liability against the Board even if the officers here had not acted according to a departmental custom and practice. *See* Amar, *supra,* 107 Harv. L. Rev. at 812 (the Framers would have found it a "shocking violation of first principles" to absolve a police department for liability in *any case* in which officers violated the Fourth Amendment, "even if they acted in good faith that their behavior was fully constitutional"). It is undisputed, however, that the officers here acted pursuant to a departmental custom and practice, so there is no need to go beyond the four corners of *Owen* in this case.

immunity doctrine.[3] Consequently, the instructions respecting municipal liability were perfectly correct, for someone must actually violate a plaintiff's constitutional rights in order for the plaintiff to hold a municipality liable for an unconstitutional custom or practice. *See* Pet. for Cert. at 5 (citing cases). To the extent Respondents are suggesting that, in order to impose municipal liability, the jury here should have been required to find – contrary to the actual instructions – that an individual officer violated "clearly established" Fourth Amendment law, *Owen* squarely forecloses this argument.

II. This Court Should Resolve Whether Officers' Failures To Seek No-Knock Warrants When All Relevant Facts Are Foreknown Precludes, Or At Least Casts Doubt On, The Constitutional Reasonableness Of No-Knock Entries.

Respondents argue that there is no real conflict concerning the first question presented and that the Eighth Circuit majority's holding on the issue is correct. Neither argument is correct.

---

[3] Jury instruction 19, the instruction on Petitioner's claim against Officer Grant, provided in full:

> Your verdict must be for the plaintiff on this claim if all of the following elements have been proved by the greater weight of the evidence:
>
> *First*, Defendant Grant entered plaintiff's residence without first knocking or waiting a reasonable period of time after announcing the presence of the police and their intentions; and
>
> *Second*, as a direct result, plaintiff was damaged.

A. The Conflict On This Issue Is Real.

Respondents contend that the Fourth Amendment conflict over the permissibility of officers' substituting their judgment for an available magistrates' with respect to whether a no-knock entry is justified "does not really exist" because (1) all four state high court decisions taking the same position as the Eighth Circuit dissenting judges rest in part on state law and (2) the most recent Minnesota and Massachusetts decisions are distinguishable on their facts. Br. in Opp. at 8-10. Respondents are wrong on both counts.

1. Each of the four state high courts cited in the Petition for Certiorari holds that *the Fourth Amendment* bars no-knock entries under the circumstances here. *See State v. Anyan*, 104 P.3d 511, 525 (Mont. 2004) ("[T]he forced entry into the Appellants' house and subsequent search was unreasonable under *the Fourth Amendment* and under Article II, Sections 10 and 11 of the Montana Constitution because . . . the exigencies claimed by the State as justification for the no-knock entry were all foreknown by the authorities.") (emphasis added), *cert. denied*, 125 S. Ct. 2544 (2005); *Commonwealth v. Jimenez*, 780 N.E.2d 2, 5-6 (Mass. 2002) (applying knock-and-announce rules based on "our common law" and "the Fourth Amendment"); *Garza v. State*, 632 N.W.2d 633, 638 (Minn. 2001) (applying "the Fourth Amendment of the U.S. Constitution"); *People v. Lujan*, 484 P.3d 1238, 1240-41 (Colo. 1971) (determining knock-and-announce rules "under the Fourth Amendment"). The first three opinions are expressly based on this Court's knock-and-announce decisions in *Wilson v. Arkansas*, 514 U.S. 927 (1995), and *Richards v. Wisconsin*, 520 U.S. 385 (1997); and the Colorado opinions apply this Court's prior case law. While some of these courts' analyses also reference parallel state protections against unreasonable searches, the courts' conclusions unquestionably depend on their interpretations of the Fourth Amendment.

To be sure, the conflicting state court decisions – just like the federal ones – arise in part from the presence of state laws and customs (like Missouri's longstanding custom here[4]) allowing police officers to obtain no-knock warrants. But these state laws, as frequently occurs in other areas of constitutional law, merely set the stage for a federal issue: here, whether the availability of such warrants sometimes renders officers' failure to obtain them constitutionally unreasonable. *Cf. Smith v. Massachusetts*, 125 S. Ct. 1129, 1138 (2005) (state law precluding reconsideration of midtrial directed verdicts creates possibility for Double Jeopardy violation); *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (state law creating sentencing thresholds creates possibility for Sixth Amendment violation); *Crawford v. Washington*, 541 U.S. 36 (2004) (ability to introduce evidence under state hearsay law gives rise to Confrontation Clause violation). On this Fourth Amendment issue, federal and state courts are divided, the First Circuit equally divided after an en banc hearing, and the Eighth Circuit divided here. *See* Pet. for Cert. at 10-15.

2. It is irrelevant that the *Garza* and *Jimenez* decisions do not actually find that the Fourth Amendment was violated. Those decisions enunciate a rule that conflicts with the Eighth Circuit's here, and – as the Petition for Certiorari explained – other decisions from Minnesota and Massachusetts have applied that rule to find Fourth Amendment violations when officers relied solely on foreknown suspicions to execute regular warrants with no-knock entries. *See* Pet. for Cert. at 12 nn.3 & 4 (discussing cases).

---

[4] While Respondents say that case law "suggests" that Missouri permits magistrates to issue no-knock warrants, Br. in Opp. at 2, there is no doubt that Missouri police officers have been allowed to obtain such warrants since long before the search at issue here. The Chief of Police testified in this very case that "[i]f you have enough information, you can go get a no-knock warrant." Tr. of Jury Trial at 585 (Oct. 23, 2002).

B. The Eighth Circuit's Holding Is Incorrect.

Two of Respondents' comments concerning the merits of this Fourth Amendment issue warrant a response.

1. Respondents repeatedly assert that Petitioner is seeking a "bright-line rule," which they suggest would be contrary to this Court's "flexible standard" for assessing no-knock entries. Br. in Opp. 10, 13. But it is the Eighth Circuit, not Petitioner, that has locked itself into a bright-line rule, holding that the failure to seek advance authorization from an available magistrate is *always irrelevant* in assessing the constitutionality of a no-knock entry. App. 10a-11a. In reviewing that decision, this Court could adopt the opposite bright-line rule (as several courts have) or a flexible standard providing (as Respondents characterizes the Montana Supreme Court as holding, *see* Br. in Opp. at 10) that the failure to seek preauthorization creates a presumption undercutting the reasonableness of a no-knock entry. It is the Eighth Circuit majority's rejection either possibility – not Petitioner's argument – that is impossible to square with this Court's Fourth Amendment precedent. *See* Pet. for Cert. at 16-18.

2. It is particularly ironic that Respondents endorse the Eighth Circuit's approach making magistrates categorically irrelevant while, at the same time, endorsing the doctrine that obtaining a no-knock warrant should "effectively immunize" individual officers from § 1983 liability and criminal prosecutions from the exclusionary rule. Br. in Opp. at 12; *see also* Pet. for Cert. at 16 & n.8 (detailing Eighth Circuit's and other courts' holdings to this effect). The only possible basis for this immunization doctrine is the Fourth Amendment's preference that determinations concerning intrusions into homes be made in the first instance by neutral magistrates. Once, however, one accepts the pertinence of the Fourth Amendment's preference in this realm, it follows inexorably that the *failure* to seek an advance determination from an available magistrate should

have an opposite effect on the legality of a no-knock entry; it should case doubt on, if not preclude, the constitutional reasonableness of such an entry.

III. This Court Should Resolve Whether Suspicions, Such As Those Here, Concerning Drug Activity And Weapons Create Exigent Circumstances Permitting Officers To Conduct No-Knock Entries.

Respondents suggest that review of the Petition's second question presented is unnecessary because (1) the question is "fact-bound" and (2) two "facts" in this case created a stronger exigency than was present in any of the allegedly conflicting decisions. Both suggestions lack merit.

1. It is, of course, true that this question presented turns to some extent on the facts in this case's record. But that is true of virtually every Fourth Amendment case involving the exigent circumstances doctrine, the reasonable suspicion doctrine, the probable cause doctrine, and any number of other doctrines. Accordingly, this Court traditionally has reviewed cases in these areas when they presented fact patterns generating conflicting results. The only serious question here is whether this case meets that standard.

2. It does. Neither the officers' suspicion that Petitioner's house contained a methamphetamine lab nor the anonymous tipster's assertion that Petitioner's son had been arrested for possessing a sawed-off shotgun distinguishes this case from the conflicting decisions cited in the Petition for Certiorari at pages 21-22. First, the Montana Supreme Court and the Seventh Circuit squarely have held suspecting the presence of a methamphetamine lab does *not* create any "inherent danger" that categorically distinguishes it from other suspected drug operations. *See Anyan*, 104 P.3d at 523-24; *Jones v. Wilhelm*, 425 F.3d 455, 466-68 (7th Cir. 2005). Respondents do not cite a single case to the contrary. And this lack of authority is not